UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMI/DIVISION OF DCX-CHOL ENTERPRISES, INC.,	)	
	)	
	)	Case No. 25-CA-117090,
and	)	et al.
	)	
INDIANA JOINT BOARD, RETAIL, WHOLESALE, DEPARTMENT STORE UNION, UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 835, A/W DETAILS, WHOLESALE, DEPARTMENT STORE UNION, UNITED FOOD & COMMERCIAL WORKERS UNION,	)'	

RESPONDENT'S OPENING BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

The Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (the "Union") filed seven separate charges against the Respondent, SMI/Division of DCX Chol Enterprises, Inc. ("DCX"). In 2013, DCX purchased the assets of Stuart Manufacturing, Inc. and took over its operations and inherited the Collective Bargaining Agreement (the "CBA") between Stuart Manufacturing and the Union. On April 30, 2014, the General Counsel issued a complaint addressing six charges against DCX and on June 9, 2014, the General Counsel issued a consolidated complaint covering all seven cases.

The General Counsel alleges in the consolidated complaint that DCX violated Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act (the "Act") by (1) on August 19, 2013, threatening employees that the plant would close and they would lose their jobs if they did not consent to the change in pay date by DCX from every other Wednesday (when Stuart

Manufacturing made payroll) to the 5th and 20th of every month to conform to DCX's other facilities; (2) that DCX threatened to divided DCX into two companies, one union and one non-union and that because certain employees were interviewed by Lionel Tobin (the President of Stuart Manufacturing) DCX bypassed the Union and dealt directly with employees despite the fact that Tobin was never an employee or had any agreement with DCX other than the asset purchase agreement.

The General Counsel also claims that DCX violated Section 8(a)(5) and 8(a)(1) by (1) refusing to recognize and bargain with the Union despite the fact that DCX has a decertification petition in hand that it did not solicit and which apparently has been approved by more than half of DCX's bargaining unit employees, (2) by not consenting to Union Representative David Altman's meetings with employees in the breakroom on August 22, 2013 consistent with the CBA, and, remarkably, (3) by showing appreciation to DCX's employees by giving all employees a $100 bill for meeting production goals in October 2013.

On September 23, 2014, the ALJ found that (1) DCX violated Section 8(a)(5) and 8(a)(1) of the Act by denying the Union access to DCX's facility on August 22, 2013; (2) that DCX violated Section 8(a)(1) of the Act by threatening employees that DCX would divide into two separate companies, one union and one non-union; (3) that DCX violated Section 8(a)(5) and 8(a)(1) by having the temerity to give all employees a $100 bonus in appreciation of obtaining a production goal in October 2013; (4) that DCX violated Section 8(a)(5) and 8(a)(1) by withdrawing recognition from the Union and declining to bargain when DCX had a decertification petition in hand; and (5) in April 2014, DCX unilaterally changed the pay dates without bargaining with the Union in violation of Section 8(a)(5) and 8(a)(1) of the Act.

DCX timely files its exceptions to certain findings of fact by the ALJ and the conclusions of law of the ALJ as more particularly set forth below.

II. STATEMENT OF FACTS

A. Sale of SMI to DCX and Current Relationship of Lionel Tobin/SMI to DCX

Stuart Manufacturing, Inc. ("SMI") was a minority-owned business owned by Lionel Tobin ("Tobin"). (Tr. at 17, 19). Because of its status as a minority-owned business and its location in a "HUB Zone," SMI was entitled to preferential treatment on certain government contracts. (*Id.* at 19-20).

On or around August 9, 2013, DCX-CHOL Enterprises ("DCX") purchased SMI's assets in an asset sale. (*Id.* at 18). At no point during negotiations over the asset purchase agreement was there any discussion about constructing a nonunion facility in the plant. (*Id.* at 38). After the sale closed, all of the SMI employees except for Tobin went to work for DCX. (*Id.* at 20).

DCX is a corporation comprised of several locations, with operations in California, Illinois, and Indiana. (*Id.* at 76). DCX is not a minority owned business or qualified as a "HUB Zone" employer. (*Id.* at 19). Because DCX is not a minority-owned business, it was not entitled to specific government contract incentive programs. (*Id.* at 35). Additionally, because DCX did not meet the requirements as a "HUB Zone" employer, it was also ineligible to receive the benefits of such an employer. (*Id.* at 24). Because DCX was not a minority-owned business and did not qualify as a HUB zone employer, it could not service some of the contracts that SMI had serviced. (*Id.* at 24).

After the asset sale closed, Tobin had planned to continue operating as SMI, hoping to eventually rent space and equipment from DCX so SMI could service some of the customers that DCX (as a non-minority-owned, non-HUB zone business) could not service. (*Id.* at 20, 25).

Because DCX could not service all of the contracts that SMI had serviced, Tobin anticipated that DCX would need to lay off employees. (*Id.* at 26). Tobin planned to employ laid-off DCX employees to work at his newly-formed venture. (*Id.* at 26). After the asset sale closed, Tobin was not an employee of DCX, and had no contractual relationship with DCX. (*Id.* at 34).

Tobin interviewed approximately fifteen DCX employees to gauge their interest in working for his potential new venture. (*Id.* at 26). When speaking to employees, Tobin indicated that he did not anticipate any changes from the conditions of employment they received as DCX employees. (*Id.* at 27-28). Tobin also did not indicate to interviewees that he was going to build a nonunion facility in the plant. (*Id.* at 38). Tobin did not have a preference for his new company to be union or nonunion. (*Id.* at 29). There was never any discussions between Tobin and DCX, either before or after the asset sale was finalized, that Tobin was going to build a nonunion facility. (*Id.* at 38). Joe Horton, one employee interviewed by Tobin, expressly denied that Tobin had indicated that a functioning company existed, or that Tobin was going to open a nonunion facility. (*Id.* at 215). Tobin has not hired any employees because DCX and SMI have not been able to come to an agreement. (*Id.* at 25).

Although Tobin received payment for work performed by DCX after the transaction had closed because of a technicality in the way the government processed payments, he directs these funds directly to DCX. (*Id.* at 31, 40-41). As of the date of trial, DCX and SMI have not arrived at any agreement for the lease of property or equipment or any consulting agreement, and SMI has hired no employees. (*Id.* at 33). Tobin has never been employed by DCX. (*Id.* at 34). Tobin has no input into DCX's operations regarding strategy, marketing, or new business opportunities. (*Id.* at 37). In fact, the relationship between SMI and DCX is presently somewhat strained, with the potential of litigation. (*Id.* at 39).

B. DCX's Post-Closing Relationship with the Union

SMI was a union shop represented by the Union. (*Id.* at 105). SMI and the Union had negotiated a collective bargaining agreement ("CBA"), which governed the terms and conditions of the employment of SMI's bargaining unit employees. (Joint Exh. 1). The CBA was to expire in February 2014. (Tr. at 53, 128). After the asset sale closed, DCX made no initial changes to the terms and conditions of the employees. (*Id.* at 48). DCX's Fort Wayne, Indiana location is the only location that is unionized. (*Id.* at 54).

In a letter dated August 19, 2013, SMI notified Union President David Altman ("Altman") of the change in ownership, explaining that DCX had purchased SMI's assets. (Joint Exh. 2). DCX indicated its understanding that it became a successor, and that it would request various modifications to the bargaining unit agreement in order to effectively and successfully manage the operations. (Joint Exh. 2).

After the transaction, DCX was essentially paying double to its third party payroll vendor—it paid once to process the Fort Wayne location's payroll, and once to process the remaining locations' payroll. (Tr. at 67-68). In an effort to cut unnecessary costs, DCX wished to place all company facilities on the same payroll schedule so that it paid to process only one payroll. (*Id.* at 68).

On or around August 19, 2013, Carol Goods-North ("Goods-North") [1] met with Altman to discuss the asset sale. (*Id.* at 50-51). DCX's Vice President and General Manager of the SMI Division of DCX, Gerald Pettit ("Pettit")[2] was also present at this meeting. (*Id.* at 52). At this meeting, DCX's Vice President of Human Resources, Goods-North, indicated to Altman that the pay dates SMI had been using and DCX's pay dates were different, and that pay dates may need

[1] Before the asset sale, Goods-North had been SMI's Director of Human Resources (Tr. at 43).
[2] Before the asset sale, Pettit had been Vice President of Operations for Stuart Manufacturing.

to change. (*Id.* at 52). Altman indicated that he did not think that the change in pay dates would be much of a problem, but that the members would probably have to vote. (*Id.* at 53).[3]

On or around August 22, 2013, at the end of a meeting between Altman, Goods-North and Pettit, Altman asked to meet with employees in the break room. (*Id.* at 86). Pettit indicated that it was not a good time to meet because DCX had some production goals to obtain and deadlines to meet. (*Id.* at 86). The asset sale was still relatively new, and concrete information was not available. (*Id.* at 86). Pettit did not want to distract employees with speculation regarding the deal. (*Id.* at 59, 87). Before the August 22, 2013 meeting and before the asset sale, SMI had previously denied Altman access to the break room when the timing was not convenient. (*Id.* at 56-57). There is no evidence that Altman made a charge of unfair labor practices as a result of such exclusions at that time. Since the August meeting, Altman has not been denied access to the break room. (*Id.* at 95).

The Fort Wayne facility was having financial difficulties and was trying to recover and become profitable again. (*Id.* at 91). In the fall of 2013, DCX president Neil Castleman set a goal for the Fort Wayne facility of $1 million in a month—a level at which he felt the Fort Wayne facility could be profitable. (*Id.* at 87, 91). This figure had not been achieved by the Fort Wayne facility for quite some time. (*Id.* at 244). When announcing the production goal to management and supervisors, Castleman did not mention anything about a potential incentive payment for reaching the production goal. (*Id.* at 91-92). In October, 2013, the Fort Wayne facility met this production goal, which was a significant achievement, because the business had been struggling. (*Id.* at 87, 246). At the end of the month, Castleman congratulated Pettit on the facility's attainment of the $1 million production goal. (*Id.* at 88). To spontaneously thank

[3] The pay dates did not change until approximately April, 2014 (Tr. at 62).

employees for their contribution to reaching this goal, Castleman asked Pettit to give all employees a crisp $100 bill. (*Id.* at 88). DCX had also given such a cash bonus at its other facilities. (*Id.* at 69).

At a companywide meeting on or around Monday, November 4, 2013, Pettit announced that Castleman wanted to reward all of the employees for doing a good job that month. (*Id.* at 88-89). On the following Monday *all employees*—both bargaining unit employees and non-bargaining unit employees—received $100 bills. (*Id.* at 89, 93, 213, 246). Union committee members were present when the $100 gift was announced, but did not object to receiving gift. (*Id.* at 94). No Union member objected to receiving the $100 or returned it. (*Id.* at 93-94, 214). Union vice president Joseph Horton and Union chair Jamarcus Tinker perceived nothing inappropriate about the receipt of the $100. (*Id.* at 214, 232).

C. Past Practice of Distributing Non-Negotiated Gifts

In or around August 2013, DCX had planned for its other divisions to attend a movie. (*Id.* at 49). DCX's then-director of human resources was in town and asked Goods-North if she believed that the Fort Wayne location's employees would like to see the movie as well. (*Id.* at 49). While Goods-North herself did not wish to see the movie, she thought it might be a good thing since everyone in the company was doing it—regardless of the location or membership in the bargaining unit. (*Id.* at 49-50). Employees were asked if they were interested in attending the moving and to inform their supervisor if they would like one or two tickets. (*Id.* at 50). Both bargain unit and management employees attended the movie. (*Id.* at 179).

Before the asset sale, SMI handed out turkeys each year at Thanksgiving. (*Id.* at 97, 180). SMI never negotiated with the Union over the decision to hand out turkeys to each employee. (*Id.* at 98, 211). SMI also hosted company picnics, prizes, and raffles, which were

never negotiated with the Union. (*Id.* at 97-98). Both before and after the transaction, DCX has provided its employees with incentive awards at its other locations. (*Id.* at 69, 73)

D. Decertification Petition

Bargaining unit member Michelle Stump filed a decertification petition on or around August 28, 2013. (*Id.* at 251-52). Stump believes that the petition was denied because of a timing issue. (*Id.* at 252). Stump refiled her decertification petition on November 12, 2013. (*Id.* at 163, 252, Resp. Exh. 1). No vote has occurred on the decertification petitions, likely because of the blocking charges presently at issue. (Tr. at 161-62, 252).

Twenty-eight or twenty-nine members of the approximately fifty-four member bargaining unit signed the decertification petition. (Tr. at 252-53, Resp. Exh. 1). Stump talked to employees in the parking lot and informed them that she had a petition for signature if they wished to get rid of the Union. (Tr. at 253). No one from DCX threatened or coerced Stump into filing the petition or provided her with additional benefits for doing so. (*Id.* at 253). Stump did not receive any benefits from gathering signatures for the decertification. (*Id.* at 253). Stump never walked around the facility seeking signatures for the decertification. (*Id.* at 257). Stump never heard from any of the employees that they were afraid that if the Union stayed the company would close. (*Id.* at 257-58).

E. DCX Learns of Decertification Petition and Questions Union Support

In November or December of 2013, the Union requested to bargain for a new contract, as the existing CBA expired in February of 2014. (*Id.* at 53). In early December, 2013, Pettit found a decertification petition on his office chair. (*Id.* at 95-96). Pettit did not inquire about, request, or encourage the filing of a decertification petition. (*Id.* at 96). After receiving this petition, DCX did not believe that the Union had the majority of the employees' support. (Joint

Exh. 3). In a letter to the Union dated January 3, 2014 DCX explained that it was in possession of a document signed by the majority of DCX bargaining unit employees indicating that they did not wish to be represented by the Union going forward. (*Id.*). While DCX indicated its willingness to honor the effective CBA, it stated its belief that it was legally obligated to honor the employees' decertification petition and could not negotiate for a contract that would cover a period of time within which the Union no longer represented the employees. (*Id.*). Notably, DCX requested that the Union provide it with case law if it believed that DCX was in error of its legal analysis. (*Id.*). The Union never provided DCX with any information suggesting that DCX was legally obligated to bargain with the union. (Tr. at 169).

F. Procedural History

It was only after the decertification petition was filed for the second time that Altman filed unfair labor practice charges regarding conduct that had allegedly occurred months earlier. (*Id.* at 167). On November 15, 2013, the Union filed a charge alleging that on or about August 19, 2013, Goods-North informed the Union that if the new owner could not get the changes to the CBA regarding pay dates that he wanted, he would close the plant and move the work. (GC Exh. 1(a)). On November 15, 2013, the Union filed a charge alleging that on August 22, 2013, Pettit refused to allow Altman to go to the employees' break room to visit with Union members during their lunch break, which it characterized as an attempt to stop the representative from communicating with Union members. (GC Exh. 1(c)). Also on November 15, 2013, the Union filed a charge alleging that Goods-North informed the Union of the intention of the new owner and the old owner to split the company into the two separate companies, and that the old owner's company would operate non-union, but with current Union employees. (GC Exh. 1(e)). On November 18, 2013, the Union filed another charge alleging that DCX had informed the Union

that "company owner" Tobin had been soliciting union members residing in a HUB Zone to work for Tobin's non-union company. (GC Exh. 1(g)).

On November 19, 2013, the Union filed another charge alleging that DCX had attempted to influence the employees' support for the union by handing out one hundred dollar bills to each employee. (GC Exh. 1(i)). On January 13, 2014, the Union filed a charge alleging that from August 19, 2013 to date, DCX had refused to bargain with the employees' certified collective bargaining representative. (GCX Exh. 1(K). On April 7, 2014, the Union filed an unfair labor practice charge alleging that DCX had refused to bargain with the employees' certified collective bargaining representative, and had unilaterally changed the employees' pay date. (GC Exh. 1(m)).

On September 23, 2014, the ALJ found that (1) DCX violated Section 8(a)(5) and 8(a)(1) of the Act by denying the Union access to DCX's facility on August 22, 2013; (2) that DCX violated Section 8(a)(1) of the Act by threatening employees that DCX would divide into two separate companies, one union and one non-union; (3) that DCX violated Section 8(a)(5) and 8(a)(1) by having the temerity to give all employees a $100 bonus in appreciation of obtaining a production goal in October 2013; (4) that DCX violated Section 8(a)(5) and 8(a)(1) by withdrawing recognition from the Union and declining to bargain when DCX had a decertification petition in hand; and (5) in April 2014, DCX unilaterally changed the pay dates without bargaining with the Union in violation of Section 8(a)(5) and 8(a)(1) of the Act.

III. DCX'S EXCEPTIONS TO ALJ'S FACTUAL FINDINGS

A. The Frequency of Altman's Meetings with the Employees

The ALJ found that DCX and Stuart Manufacturing, Inc. generally met with the Union on a monthly basis to conduct grievance meetings. (ALJ Order at 5). DCX does not dispute that

finding. However, the ALJ also stated that "[a]fter many of those meetings, Altman asked Goods-North if he could meet with employees in the break room." (*Id.*). There was no testimony in the transcript pages cited as to the frequency of Altman's meetings with the employees in the breakroom.

The relevant testimony from Goods-North regarding Altman's meetings was as follows:

Q: You said that – I'm going to change gears now. You said that the union and the company usually meet every month, once a month?
A: That's correct.
Q: Is that like grievance meetings?
A: Yes.
Q: Sometimes you are participating at the meeting by conference call.
A: That's correct.
Q: Then Mr. Altman is there at the facility?
A: Yes, that's correct.
Q: Isn't it true that Mr. Altman has sometimes asked you to meet with employees in the break room after the meeting is done?
A: Yes.

***

Q: Mr. Altman has asked you to meet with the employees at that break room in the past.
A: He has.
Q: Have you ever denied him access?
A: I believe there was one time I did personally.

***

Q: He always asked.
A: He always asked, yes—
Q: Okay.
A: --- from what I know.

(Tr. at 55-57). The findings of facts of the ALJ regarding the frequency of the meetings between the bargaining unit employees of SMI or DCX are not supported by the Record.

B. Attendance at the November 4, 2013 Meeting

The ALJ found that the below-average attendance at the November 4, 2013 meeting "was surprising because: employees still had questions related to the recent change in ownership; the Union was electing officers that day; and Union meetings normally drew 8-15 employees." (ALJ Order at 9). However, the ALJ recognized that the time of the meeting was changed that very day. (ALJ Order at 9; Tr. at 125-26). Further, the testimony was that Tinker was surprised at the attendance. (Tr. at 229). That was Tinker's impression. There was no testimony from any employee who did not attend the meeting regarding the reasons why they did not attend and there was no testimony that employees still had questions relating to the change in ownership, other than Tinker's supposition.

C. Tobin's Relationship with DCX

The General Counsel claimed that DCX was guilty of direct dealing because Tobin, who was not an employee of DCX, interviewed employees about the possibility of employment with SMI. Although the ALJ found in favor of DCX on the General Counsel's claim of direct dealing, the ALJ made a number of findings that are not supported by the Record. For example, the ALJ concluded that "although Respondent's employees would have been uncertain about Tobin's precise role with Respondent, Respondent's employees would reasonably have believed that Tobin was authorized to act on Respondent's behalf when he spoke to employees about joining Stuart Manufacturing." (ALJ Order at 18). There were employees who testified at the administrative hearing. Not one employee testified that they were uncertain about Tobin's role or that they believed that Tobin was acting on behalf of DCX when he spoke to them about joining SMI. If this was true and the employees were confused, the testimony could have been easily elicited by the General Counsel. There was no testimony and the ALJ was not free to speculate in its absence. *G & H Products, Inc. v. N.L.R.B.*, 714 F.2d 1397, 1401 (7th Cir. 1983).

The ALJ also concluded that "Tobin had apparent authority to act on Respondent's behalf when he spoke to employees about working for Stuart Manufacturing, because Respondent's employees reasonably would have believed that Respondent and Tobin were working together to restart Stuart Manufacturing, with Tobin as the point-person for that venture." (ALJ Order at 18). Again, there is no evidence that DCX was working with Stuart Manufacturing to restart Stuart Manufacturing and in fact that was expressly denied both by DCX (Goods-North) and Stuart Manufacturing (Tobin). Further, not one employee testified that they believed that DCX and Tobin were working together to restart Stuart Manufacturing. That factual finding is rank speculation.

IV. DCX'S OBJECTION TO ALJ'S LEGAL CONCLUSION

A. Denial of Union Officials Access to Employee Breakroom

1. Standard of Review

The ALJ concluded that DCX violated Section 8(a)(5) and 8(a)(1) of the Act on August 22, 2013, by unilaterally denying Union officials to the employee break room at its facility. (ALJ Order at 15). Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]." Section 8(a)(5) provides that it is an unlawful labor practice to "refuse to bargain collectively with the representatives of his employees..." Since the actions of DCX were consistent with the CBA that governed the parties' relationship, there can be no violation.

2. CBA Permitted Access to Union Only with Consent of DCX

There is no dispute that the CBA gave Altman and the Union the right to request to meet with bargaining unit employees. ("[A]n International representative of the Union shall be granted admission to the facility during work hours after his request has been granted by the

senior management"). The ALJ correctly concluded that regular and longstanding practices may become terms and conditions of employment even if not required by the CBA. (ALJ Order at 15). The party asserting an evidence of past practice bears the burden of proof on that issue and must show the practice occurred with such regularity and frequency that the employees could expect the practice to continue. There is no need to consider past practice, however, as the CBA expressly addressed this situation and the Record was clear that the parties acted consistently with the terms of the CBA.

3. "Past Practice" Doctrine is Inapplicable

The AJ relied on the "long standing practice" exception, that is, that "an uninterrupted and accepted custom may become an implied term and condition of employment by mutual consent of the parties." *Intermountain Rural Elec. Ass'n v. NLRB,* 984 F.2d 1562, 1568 (10th Cir. 1993). Once established, a unilateral change to that long-standing practice is unlawful. *Id.* As the ALJ recognized, the "party asserting the existence of a past practice bears the burden of proof on this issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis." (ALJ Order at 15).

As an initial matter, the Union failed to meet its burden of demonstrating that Altman met with the employees with such regularity and frequency amounted to a condition of employment. The sole finding with respect to this matter by the ALJ is that DCX and Stuart "generally" met with the Union each month to conduct grievance meetings and after "many" of these meetings, "Altman asked Goods-North if he could meet with employees in the break room" and that "Goods-North routinely granted Altman's requests." (ALJ Order at 5). The transcript pages

cited for this testimony do not bear out that Altman met with employees after "many" of these meetings. (Tr. at 55-57, 99). As set forth above, the relevant testimony was as follows:

> Q: You said that – I'm going to change gears now. You said that the union and the company usually meet every month, once a month?
> A: That's correct.
> Q: Is that like grievance meetings?
> A: Yes.
> Q: Sometimes you are participating at the meeting by conference call.
> A: That's correct.
> Q: Then Mr. Altman is there at the facility?
> A: Yes, that's correct.
> Q: Isn't it true that Mr. Altman has sometimes asked you to meet with employees in the break room after the meeting is done?
> A: Yes.
> ***
> Q: Mr. Altman has asked you to meet with the employees at that break room in the past.
> A: He has.
> Q: Have you ever denied him access?
> A: I believe there was one time I did personally.
> ***
> Q: He always asked.
> A: He always asked, yes—
> Q: Okay.
> A: --- from what I know.

(Tr. at 55-57).

As set forth above, the ALJ erred in finding that after "many" meetings Altman asked Goods-North if he could meet with employees in the break room. There was no evidence that the practice occurred with regularity and frequency. There was no evidence that the employees expected Altman to be in the break room after a monthly grievance meeting. The Union wholly failed to meet its burden that Altman's meeting with employees in the break room following a monthly grievance meeting was so consistent and regular that it became a term and condition of employment.

Furthermore, what is the term and condition of employment that DCX violated? The CBA provides that an "International representative of the Union shall be granted admission to the facility during work hours after his request has been granted by the senior management."[4] The evidence indicated that Altman asked for permission and that DCX granted, denied, or limited his request. At all times, then, all parties acted consistently with the CBA. There was no need to find a past practice because the parties were acting consistently with the CBA. The interplay between a "past practice" and the CBA has been discussed extensively by courts within the Seventh Circuit. Specifically, "the parties' past practices are not necessarily equivalent to contractual provisions." *Judsen Rubber Works, Inc. v. Manufacturing, Production & Service Workers Union Local No. 24,* 889 F.Supp. 1057, 1063 (N.D.Ill. 1995).

> We return now, to examine the critical question posed by this case, namely, when is implying a contractual term from past practice proper as opposed to constituting an impermissible modification of the contract. *Chicago Web* illustrates one circumstance in which reliance on past practice is proper—namely, where the CBA is silent on a particular issue. *See Chicago Web,* 772 F.2d at 385 ("The final collective bargaining agreement was silent on the issue of how seniority was to be determined."). Yet another case involving the Printing Pressmen's Union No. 7 and the Newspaper Publishers' Association illustrates another instance in which reliance on past practice is unquestionably appropriate—namely, where the arbitrator's task involves interpreting "provisions of the contract which would be ambiguous absent reference to the prior practice" of the parties. *Chicago Newspaper Publishers' Ass'n v. Chicago Web Printing Pressmen's Union No. 7,* 821 F.2d 390 (7th Cir.1987) (hereafter referred to as *CNPA*). In *CNPA,* the arbitrator was called upon to decide whether the Chicago Tribune had violated its

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[4] Cases discussing the "long-standing practices" of the employer do so in the context of a condition that is not addressed by the CBA. *See, e.g., Frankl v. HTH Corp.,* 825 F.Supp.2d 1010, 1036 (D.Hawaii 2011) (Longstanding practices may become conditions "even if these practices are not required by a collective bargaining agreement"); *Sunoco, Inc.,* 349 NLRB No. 26, 349 NLRB 240, 244, 2007 WL 324547 (2007) ("Although there were no contractual restrictions on Respondent's ability to subcontract, its established past practice of affording its unit drivers the opportunity to perform jet fuel deliveries before contracting out was a term and condition of their employment"); *Prime Healthcare Services-Garden Grove,* 357 NLRB No. 63, 2011 WL 3804018 at *8 (2011) ("An employer's regular and longstanding practices that are neither random nor intermittent becomes terms and conditions of employment even if these practices are not required by a collective bargaining agreement").

collective bargaining agreement with the Pressmen's Union by bypassing the Union's call room procedure when it promoted certain apprentice pressmen to fill vacant journeymen positions. The arbitrator, relying on the parties' past practice of hiring journeymen from the Union call room, concluded that the Tribune violated the agreement. The arbitrator rejected the Publishers' Association's argument that past practice was irrelevant, responding that "[t]here are numerous provisions of the agreement which make reference to the call room and the hiring of journeymen pressmen. Those provisions would be difficult, if not impossible to properly understand and apply in the absence of any evidence concerning their past operation and interpretation." *CNPA,* 821 F.2d at 396 (quoting the Arbitration Opinion). In affirming the district court's affirmance of the arbitration award, the Seventh Circuit observed, "[i]n rendering this award, the arbitrator did nothing more than refer to the past practices of the parties to interpret the contract." *Id.* at 396. The court added:

> Here the arbitrator demonstrated that he was aware of the limits of his authority when he stated that he was not "free to add to, subtract from, or modify the provisions of the agreement" since interpreting the contract in that manner would violate the clear dictates of the contract. The arbitrator noted that he only utilized the past practices of the parties to interpret provisions of the contract which would be ambiguous absent reference to the prior practice of the Tribune and the Union. We do not find the arbitrator's decision in the present case to be a "manifest disregard of the agreement, totally unsupported by principles of contract construction."

Id. at 397. The significance of this passage lies not in the fact that the arbitrator spoke some magic words indicating that he was interpreting the contract—this is, of course, unnecessary, *Ethyl Corp.,* 768 F.2d at 187 ("This is not to say that simply by making the right noises—noises of contract interpretation—an arbitrator can shield from judicial correction an outlandish disposition of a grievance."); rather, the passage is instructive insofar as it recognizes a distinction between properly relying on past practice to interpret a contract and improperly relying on past practice to modify a contract. *See id.* at 186 ("Inferring an implied condition must be distinguished from creating one, tenuous as the distinction may be as a practical matter. The arbitrator may not modify the contract unless authorized to do so.") The key, as we read the Seventh Circuit opinions, is that reliance on past practice is proper where it is in the service of interpreting the contract rather than serving as a mechanism to rewrite a contract based on the arbitrator's sense of industrial fairness. *See Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionery & Tobacco Workers' Int'l Union,* 832 F.2d 81, 84 (7th Cir.1987) ("[R]eliance on the law of the shop is appropriate to interpret ambiguous contract terms ... the law of the shop cannot be relied upon to modify clear and unambiguous provisions."). In this regard, we find the following passage concerning past practice and the "common law of the shop" instructive:

> when there are overlapping contracts, or where a party seeks to disambiguate a contractual provision by reference to the parties' practices, the concept of the "common law of the shop" comes into play.... But this is not true common law; it is an interpretive concept. It denotes a methodology for interpreting a written contract....
>
> *International Ass'n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. General Elec. Co.,* 865 F.2d 902, 906 (7th Cir.1989) (citations omitted). This passage reinforces our conclusion that past practice and the common law of the shop are not licenses for creating new contractual terms but are merely vehicles for contract interpretation. Thus, we conclude that for reliance on past practice to be proper, it must be predicated on some need for interpretive assistance. Certainly, where a contractual term is ambiguous, or where a provision cannot be understood without reference to past practices, or where the agreement itself makes reference to the parties' past practice, reliance on past practice is wholly proper; however, absent some such consideration (and we did not, of course, attempt to be exhaustive), we believe that reliance on past practice crosses the fine line between interpretation and modification.
>
> With the foregoing principles in mind, our review of the arbitration award in this case convinces us that the arbitrator acted outside the scope of his authority in relying on the parties' past practice to modify the parties' agreement and, hence, he did not base his award on the essence of the CBA.

Id. at 103-64.[5]

This issue was addressed again in *Anheuser-Busch, Inc. v. Local Union No. 744,* 280 F.3d 1133 (7th Cir. 2002). An employer brought an action to vacate an arbitration award that required it to pay commission rates that did not comport with the collective bargaining agreement. The

[5] The ALJ relies on two cases in support of its application of the past practices doctrine. In *Palm Beach Metro Transportation, LLC,* 357 NLRB 26, 2011 WL 3151778 (2011), the *employer* attempted to justify its actions by a past practice and the employer's rationale was rejected by the NLRB. In *Prime Healthcare Services-Garden Grove,* 357 NLRB No. 63, 2011 WL 3804018 (2011). The NLRB held that a longstanding practice might become a term and condition of employment "even if these practices are not required by a collective bargaining agreement." Here, access to the facility *was* addressed and provided for in the CBA and the parties adhered to its terms.

district court granted summary judgment in favor of the Union and the Seventh Circuit reversed, with Judge Coffey reasoning: [6]

> Anheuser–Busch claims that the arbitrator *modified* (rather than interpreted) the terms of the contract when he found a way to employ language not found any place in the contract (in fact contrary to the express language of the contract) by relying on what he referred to as a "long standing practice" (the payment of one commission rate for all drivers) in spite of the very language of the zipper clause stating, " *This Agreement constitutes the full and complete agreement between the parties and supercedes all prior agreements between the parties or their representatives, oral or written, including all practices not specifically preserved by the express provisions of this Agreement.*" The company argues that the very language of the contract contained everything the arbitrator needed to render his decision and barred him from considering the parties' practices. Additionally, the company claims that the arbitrator improperly reached outside the contract and relied on the parties' practices in place of the agreement's clear and unambiguous language requiring the payment of disparate commission rates between drivers working alone and those using helpers. " *To place past practice on a par with the parties' written agreement* would create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice." *Chicago Web Printing Pressmen's Union # 7 v. Chicago Newspaper Publ'rs Ass'n,* 772 F.2d 384, 387 (7th Cir.1985). The employer further contends that the arbitrator exceeded the contract's limitation on his power not to "add to, subtract from, modify or change in any way" the terms of the written 1998 contract. We agree with the employer.
>
> In *Tootsie Roll Industries,* 832 F.2d at 84, we noted that, "[w]hile [an arbitrator's] reliance on the law of the shop is appropriate to interpret *ambiguous* contract terms ... the law of the shop cannot be relied upon to *modify clear and unambiguous provisions.*" *See also International Ass'n of Mach., Lodge # 1000 v. General Elec. Co.,* 865 F.2d 902, 906 (7th Cir.1989) (the "common law of the shop comes into play" only when an ambiguity in the written collective bargaining agreement requires interpretation); *Ethyl Corp.,* 768 F.2d at 186 ("The arbitrator may not modify the contract unless authorized to do so."); *Judson Rubber Works, Inc. v. Mfg. Prod'n & Serv. Workers Union #24,* 889 F.Supp.

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[6] *Anheuser-Busch* was a rare one-one-one tie in the Seventh Circuit Court of Appeals – a lead opinion, a concurrence in the judgment, and a dissent. Thus, for example, in *International Union of Operating Engineers, Local 139 v. J.H. Findorff & Son, Inc.,* 393 F.3d 742 (7th Cir. 2004), the Court found that Judge Rovner's concurrence tipped the balance. *Id.* at 747. However, even Judge Rovner agreed that "any prior oral understandings that Anheuser-Busch may have had with the union, and any previous practice with respect to the commissions paid on two-person routes, cannot be imported into the 1998 agreement." *Anheuser-Busch,* 280 F.3d at 1145.

1057, 1066 (N.D.Ill. 1996) (an award will not be enforced when it "draws its essence solely from the parties' past practice").

Id. at 1138-39.

The CBA Agreement here is not ambiguous. It provides that a representative, such as Altman, is entitled to admission to the facility during work hours with consent of the company. On August 22, 2013, the company did not consent. The ALJ erred, as a matter of law, when he used past practices to find a violation contrary to the terms of the CBA and despite the fact that the CBA was clear, unambiguous, and in no need of interpretation.

4. Decision of ALJ is Contrary to Public Policy

The ALJ's decision relying on past practices also runs afoul of public policy. For example, DCX could have reasonably believed that it was relying on the plain and unambiguous terms of the CBA when it declined to permit Altman access to the employees on August 22, 2013. However, because the ALJ subsequently found that past practices dictated that DCX usually (or even always) granted Altman permission, DCX was found to have violated the law despite the fact that it was acting consistently with the CBA. This conclusion seems neither just nor fair. Further, the ALJ appeared to hold that the "past practice" was the *consent* of DCX and Stuart Manufacturing such that Altman was *always* entitled to consent. Perhaps an unintended consequence – but a rational response – is that the employer, instead of cooperating and accommodating the representative as DCX did here, should routinely *withhold* consent if for no other reason to preserve the right to do so in the future. That should not be a choice that employers are forced to make or one that the NLRB should endorse.

The Arbitrator erred by concluding that DCX unlawfully denied union officials access to the employee break room when the CBA gave DCX the right to do so.

B. DCX'S THREAT TO DIVIDE INTO TWO COMPANIES

1. Standard of Review

The ALJ concluded that on October 16, 2013, DCX threatened employees that Respondent would divide into two companies, one union and one non-union, and violation Section 8(a)(1) of the Act. Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]."

2. Relationship Between Stuart Manufacturing, Inc. and DCX

The ALJ concluded that Goods-North, on one occasion, told the Union that DCX would operate under the CBA but Stuart Manufacturing would not because it would be non-union. This is a curious finding since the ALJ also concluded that Tobin interviewed approximately fifteen employees and assured them that their working conditions would remain the same and that "[t]here is no evidence that Tobin stated or indicated in these meetings that Stuart Manufacturing would operate as a non union company." (ALJ Order at 8). Moreover, when Goods-North supposedly said that Stuart Manufacturing would be non-union, Altman said he would talk to Tobin's employees and unionize them. There was no evidence that anyone disputed that Altman had a right to do so or that there was any pushback from DCX or Stuart Manufacturing.

The ALJ also concluded that DCX and Stuart Manufacturing had a "close, if not cozy, relationship." (ALJ Order at 14). Again, the evidence in support of this claim is lacking. DCX did advise the Union that Respondent and Stuart Manufacturing were working out the details about the customers that each company would handle going forward, but this is not strange given that Stuart Manufacturing was a minority owned business and DCX was not. There were certain customers who preferred doing business with a minority owned business due to certain economic

advantages. There was nothing untoward about a discussion about which customers each would service under these circumstances.

The ALJ also relied on the fact that DCX allowed Tobin to keep his old office and telephone and enter DCX to speak to employees about the possibility of working at Stuart Manufacturing. (FOF, Section II(E)(1)). There was no evidence that the employees were aware that Tobin retained an office and a telephone. Moreover, given the parties' relationship, there is nothing unusual about this arrangement. DCX and Stuart Manufacturing had discussed the lease of certain space and equipment for Stuart Manufacturing's activities. There is no evidence that this arrangement was anything more than an arms-length transaction between the purchaser of assets and the former owner of the assets.

Further, the ALJ found that Tobin assured the employees that Stuart Manufacturing, Inc. would offer the same terms and conditions as DCX and that there was no evidence that Tobin told any employee that Stuart Manufacturing, Inc. would be non-union. (ALJ Order at 8). Tobin has never been employed by DCX. (Tr. at 34). Tobin has no input into DCX's operations regarding strategy, marketing, or new business opportunities. (Tr. at 37). In fact, the relationship between SMI and DCX is presently somewhat strained, with the potential of litigation. (Tr. at 39).

From here, the ALJ piles unfounded inference upon unfounded inference. For example, the ALJ found that in light of the relationship between DCX and Stuart Manufacturing (what relationship?) and the fact that Goods-North was Tobin's sister (not one employee testified that they were aware of this relationship or that they considered it significant), that "a reasonable employee would have taken Goods-North at her word when she represented that Respondent's employees would be unionized while Stuart Manufacturing's employees would be non union."

(ALJ Order at 14). However, although employees of DCX testified, not one employee testified that they took Goods-North at her word because of the supposed relationship between DCX and Stuart Manufacturing.

Moreover, even if the ALJ is correct, its legal conclusion that Goods-North's statement was a violation of Section 8(a)(1) is completely unfounded. The ALJ claims that Respondent informed the Union that "union membership would be incompatible with employment at Stuart Manufacturing, and thereby violated Section 8(a)(1) of the Act by making statements that had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." (ALJ Order at 14-15). How would the statement by Goods-North, even if true, interfere with the employee's Section 7 rights? The Union's relationship with DCX was not threatened, the employees were not threatened that they would lose their positions with DCX, nor were the employees urged to defect to Stuart Manufacturing. In light of these facts, none of which are in dispute, how did Goods-North's statements regarding a separate and distinct company threaten or coerce DCX's employees? Not one single employee testified that they believed that Goods-North's statement restrained or interfered with their rights as members of the Union.

The ALJ relied on two cases which are so inapposite that they support a contrary conclusion. For example, in *Ryder Truck Rental,* 318 NLRB No. 117, 318 NLRB 1092, 1995 WL 547774 (1995), the facts were as follows:

> The Respondent, as noted, opened a permanent maintenance operation in Novi on June 4, situated about an eighth of a mile from the PFS location, and staffed it with four individuals—Rod Markin, Steve Orvis, Bogoljub Jakovljeski, and Martin Stankus —all of whom had been employed at the Livonia facility, so that all work that was previously done at the PFS parking lot was thereafter performed at the nearby Novi site. Prior to being transferred, all four employees were told by the Respondent that the Novi facility was to be a nonunion shop and that the contract it had with the Union covering its other facilities would not apply to the

> Novi site. According to Spence, employees were told this was because Respondent wanted employees to know "up front" about the nonunion status of the Novi facility before accepting a transfer to that facility.

Id. at 1094. Thus, in *Ryder* truck, the employer was opening its own facility, the facility was actually opened, specific employees were offered transfers, and those specific employees were told, by the operator of the facility, that it would be non-union.

Similarly, in *Kessel Foods Markets,* 287 NLRB No. 47, 287 NLRB 426, 1987 WL 90101 (1987), the NLRB held that when "an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the seller's employees to ensure its nonunion status" and that such statements violate Section 8(a)(1).

Neither of these cases support the decision of the ALJ. Here, as opposed to *Ryder Truck Rental,* the statement was *not made* by the employer but by an employee of another company, the facility was never opened, and no employee was told by the owner of the company (Tobin) that the potential facility would be non-union. Similarly, as opposed to *Kessel,* the employer (Stuart Manufacturing) never told the company that it would be nonunion. The cases simply do not support the decision that DCX interfered with any Section 7 rights.[7]

C. $100 Bonus to Employees

1. Standard of Review

[7] This conclusion is buttressed by the fact that the ALJ refused to find that DCX was guilty of direct dealing because the General Counsel "did not show that Tobin's conversations with employees were for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or undercutting the Union's role in bargaining... It was not possible to discuss any specifics about the revamped company (beyond generally assuring employees that their working conditions would remain the same) because the idea of restarting Stuart Manufacturing was just that – an idea." (ALJ Order at 18).

Remarkably, the ALJ also found that DCX violated Section 8(a)(1) and 8(a)(5) of the Act by giving all employees a $100 bonus for reaching a production goal. (ALJ Order at 20). Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]." Section 8(a)(5) provides that it is an unlawful labor practice to "refuse to bargain collectively with the representatives of his employees..."

2. $100 Was Not a Form of Compensation

With respect to the $100 bonus, the ALJ recognized that employers do not have to bargain for gifts. (ALJ Order at 19). However, the ALJ found that the $100 award was a form of compensation because its employees collectively reached a performance goal. (*Id.*). The conclusion that the $100 was compensation was not supported by the factual findings. In *Unite Here v. NLRB,* 546 F.3d 239 (2nd Cir. 2008), the Court affirmed a finding that a one-time award of stock to employees as a result of a successful IPO was a gift. As the Court stated, the "stock award here was a one-time event, given to each employee, regardless of rank, in an equal amount." *Id.* at 244. The Second Circuit held that bonuses are the subject of mandatory bargaining when they were paid "over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, part of their anticipated remuneration." *Id.* at 243 quoting *NLRB v. Electro Vector, Inc.,* 539 F.2d 35, 37 (9th Cir. 1976). Here, the bonus was given to bargaining unit and management employees alike in an equal amount. It was not given over a sufficient period of time to become a reasonable expectation of the employees. *See Century Elec. Motor Co. v. NLRB,* 447 F.2d 10, 14 (8th Cir. 1971) (A "regularly paid bonus" may be relied upon as part of total compensation).

3. $100 Bonus Was not an Unlawful Unilateral Change

The ALJ also based its decision largely on the fact that the $100 was a new development at "Respondent's facility" and was an "unprecedented award of additional compensation at the facility." (ALJ Order at 20). However, there was testimony that cash awards were given by DCX at its other facilities. (Tr. at 69, 73). DCX had only been operating this facility for less than 90 days when the $100 gift was made. Thus, it was an abuse of discretion for the ALJ to carefully hold that DCX failed to establish a "practice of giving employees at the Fort Wayne facility cash" and that the $100 bonus was "unprecedented" when DCX had done that at its other facility and had only been operating at Fort Wayne for a short period of time. (ALJ Order at 20).

D. DCX DID NOT WITHDRAW RECOGNITION FROM UNION

1. Standard of Review

The ALJ also concluded DCX violated Section 8(a)(1) and 8(a)(5) of the Act by withdrawing recognition from the Union and refusing to bargain through its correspondence of January 3, 2014. (ALJ Order at 21). Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]." Section 8(a)(5) provides that it is an unlawful labor practice to "refuse to bargain collectively with the representatives of his employees…"

2. DCX Did Not Withdraw Recognition from Union

The ALJ's conclusion that DCX failed to bargain and with the Union is based primarily on *UGL-UNICCO Service Company,* 357 NLRB No. 76 (2011). In *UGL,* the Board modified the successor bar doctrine previously discarded by the Board in *MV Transportation,* 337 NLRB 770 (2002). *UGL* held that "where the successor employer has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes." The Board in *UGL* defined a reasonable period of time as 6 months. The ALJ also

concluded that *UGL* stands for the proposition that the successor employer may not withdraw recognition from the union based on the loss of majority support. *UGL-UNICCO* contained a well-reasoned dissent by Member Hayes regarding the re-establishment of the "successor bar."

Moreover, even assuming the wisdom of *UGL-UNICCO,* there are several important distinctions between this case and *UGL.* First, there were discussions between DCX and the Union from August 2013 until January 3, 2014, a *span* of six months if not quite a six month period of time. Second, in this case DCX was in actual possession of an unsolicited petition for decertification. There is no evidence that this situation existed in *UGL.* Third, there is no evidence that DCX refused to recognize the Union. In fact, the January 3, 2014 correspondence states that DCX will continue to honor the CBA, which it did, other than the *de minimis* deviations set forth herein. Finally, in the January 3, 2014 correspondence, DCX invited the Union to provide contrary legal authority if it believed that DCX's decision was in error. There is no evidence that the Union ever did provide such legal authority (including the authority that the General Counsel now claims clearly supports its position),[8] prior to filing its Complaints.

DCX was placed in a difficult position because a majority of the bargaining unit employees, on their own, had signed a petition for decertification. Thus, if DCX were to negotiate with the Union, it would be negotiating with an entity that did not have the support of a majority of the bargaining unit employees.

There is no evidence that DCX was unwilling to bargain with the Union or enter into a new Collective Bargaining Agreement until it received a petition for decertification from a majority of its bargaining unit employees. Based upon the petition, DCX reasonably believed that the Union no longer spoke for a majority of the bargaining unit employees. If one purpose

[8] Neither the General Counsel nor the Union have ever offered any explanation as to why the Union did not provide DCX with the authority that it now argues is dispositive.

of the Union is to represent its employees in negotiations with the employer, that purpose appears to have failed in this instance. DCX was understandably reluctant to negotiate with the Union and bind all bargaining unit employees, a majority of whom had expressed dissatisfaction with the Union. This is not a fact scenario that is addressed by *UGL*. Moreover, DCX did not simply stonewall the Union – it explained its position and requested a response to the extent that the Union disagreed. There is no evidence that the Union ever provided a response to DCX other than filing charges. Under these circumstances, which are admittedly unique, the NLRB has failed to demonstrate that it has a likely chance of success on the merits.

E. CHANGE OF PAY DATES

1. Standard of Review

Finally, the ALJ concluded that DCX unilaterally changed employee pay dates without notifying or bargaining with the Union and violated Section 8(a)(5) and (a)(1) of the Act. (ALJ Order at 23). Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]." Section 8(a)(5) provides that it is an unlawful labor practice to "refuse to bargain collectively with the representatives of his employees…"

2. Change of Pay Dates Was Not Substantial Change

The Collective Bargaining Agreement did state that the employees would be paid every other Wednesday and DCX changed the payroll to the 5th and 20th of the month. The ALJ found that the General Counsel failed to prove that Goods-North threatened to close the plant if the payroll was not changed. (ALJ Order at 14). However, in the ALJ's legal conclusions, the ALJ still found that DCX violated Section 8(a)(1) of the Act by changing the pay dates. (*Id.* at 23).

Moreover, although the Record is not clear, depending on when the change occurred in proximity to a former pay date, the employees could have received a small financial windfall if they received their pay earlier than they otherwise would have. Either way, the change in pay resulted in a de minimas change. As the NLRB has held that "not every unilateral change in work…rules constitute a breach of the bargaining obligation. The change must unilaterally imposed must, initially, amount to "a material, substantial, and a significant one." *Peerless Food Products,* 236 NLRB No. 23 (1978). For example, in *Rust Craft Broadcasting of New York, Inc.,* 225 NLRB No. 65 (1976), the employer installed timelocks instead of the employees entering their time manually. The timelocks were designed to assure more accurate time keeping. The NLRB found no violation since there was not a material, substantial, and significant change.

Here, the ALJ does not explain why the change in pay date was material or significant. The Record here does not indicate when the last payment was made on a Wednesday although the ALJ found that the change was implemented on March 27, 2014 a Thursday. If March 26, 2014 was a payday, and the next scheduled payday Wednesday was April 9, 2014, then the employees received their pay *early* after the change in pay date. However, if the pay date was Wednesday, March 19, 2014, and the next scheduled Wednesday was April 2, 2014, then the employees received their pay two days later (if paid on Friday, April 4, 2014) or five days later (if paid on Monday, April 7, 2014). Even under this scenario, though, the employees would have received a slightly *larger* check on the 4th or the 7th, offsetting any small delay. The math gets complicated but suffice it to say the theoretical interest on the pay received early or the pay received late is pennies. Any violation simply is not material, substantial, or significant.

F. REMEDIES DO NOT FURTHER PURPOSES OF THE ACT

Finally, the remedies do not further purposes of the Act. For example, the ALJ suggested that DCX "must make its employees whole for any loss of earnings and other benefits that resulted from its unilateral and unlawful decisions to" give a bonus and change the employee pay dates. Further, the ALJ states that "backpay" for these violations shall be computed with interest and compounded daily. (ALJ Order at 24). With respect to the $100 bonus, DCX believes that the only "remedy" is to request that the bargaining unit employees repay the $100, with interest, to DCX or that the $100, with interest, be deducted from the next payroll check. This seems to be a strange "remedy" for an organization that ostensibly has the best interests of its members at heart, but that is the relief the General Counsel has requested, and received, from the ALJ. With respect to the pay, the same result may occur if the pay was received early by the employees.

The ALJ also ordered that on request and for a reasonable period of time that DCX must bargain with the Union as the exclusive collective-bargaining representative of the employees. (ALJ Order at 26). However, the ALJ does not give any guidance to DCX as to how to address the decertification position. To the extent that DCX is to bargain with the Union as the exclusive representative of the employees, the Union no longer has the support of at least half of its employees.

V. CONCLUSION

Based on the foregoing, DCX respectfully requests that the Consolidated Complaint be dismissed in its entirety.

Respectfully Submitted,

BARRETT & McNAGNY LLP

By: _____

H. Joseph Cohen, #19303-02
Michael H. Michmerhuizen, #22086-0202
215 E. Berry Street
Fort Wayne, IN 46801
Phone: (260) 423-9551
Fax: (260) 423-8920
E-mail: hjc@barrettlaw.com
mhm@barrettlaw.com

Attorneys for Respondent,
SMI Division of DCX-CHOL Enterprises, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been filed electronically through the E-filing Program this 21st day of October, 2014. On the same date a copy of said filing was served by electronic mail upon the following persons:

Gladys Rebekah Ramirez
National Labor Relations Board - Ind/IN
Region 25
575 N Pennsylvania Room 238
Indianapolis, IN 46204-1577
Email: Rebekah.Ramirez@nlrb.gov

_____
H. Joseph Cohen